IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-666

AL DAYON, individually and on behalf of MASTERCRAFT ELECTRONICS CORP.,

Plaintiff-Petitioner,

—v.—

THE HONORABLE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, THE HONORABLE HAROLD A. STEVENS, THE HONORABLE THEODORE R. KUPFERMAN, THE HONORABLE GEORGE TILZER, THE HONORABLE AARON STEUER and THE HONORABLE EMILIO NUNEZ, Justices of the SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT,

Defendants-Respondents,

THE HON. VINCENT A. MASSI, Justice of the SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, DOWNE COMMUNICATIONS, INC., EDWARD R. DOWNE, JR., WILLIAM H. KEHL, as Sheriff of the City of New York, and THE AETNA CASUALTY AND SURETY COMPANY,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CITATIONS

To: The Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Statement

The petitioner, Al Dayon, individually and on behalf of Mastercraft Electronics Corp., by his attorney, Bernard G. Ehrlich, Esq., respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Second Circuit from the judgment of the said Court of Appeals dated June 16, 1976 (A-7) which, without opinion, affirmed the order of a single judge of the United States District Court for the Southern District of New York dated April 22, 1975 which dismissed the complaint against the respondents, before answer, for lack of subject matter jurisdiction pursuant to Fed.Rules Civ. Proc., Rule 12(b)(1), 28 U.S.C.A., on the ground that the "plaintiff's claimed deprivations are, in this Court's view, sufficiently without merit to preclude the invocation of subject matter jurisdiction" (A-5). The petitioner timely petitioned the United States Court of Appeals for the Second Circuit for rehearing of the appeal. The said Court of Appeals denied that petition for rehearing, without opinion, by order dated August 13, 1976 (A-9).

It is respectfully submitted that the issue of subject matter jurisdiction of the federal court is an important issue of wide concern and effect upon litigants and the federal courts and that certiorari should be

granted. Hagans v. Levine, 415 U.S. 528, 533 (1974).

The Attorney General of the State of New York appeared only for the named respondents and made the motion to dismiss the complaint pursuant to Fed. Rules Civ. Proc., Rule 12(b)(1), 28 U.S.C.A. He did not appear for and he did not make any motion on behalf of the defendant, the Hon. Vincent R. Massi, Justice of the Supreme Court of the State of New York. The said Justice Massi was personally served with the summons and complaint in this action by the United States Marshal on January 7, 1974. He died on April 24, 1974 without appearing in this action. No motion to substitute pursuant to Fed. Rules Civ. Proc., Rule 25 has been made as to the said late Justice.

None of the other named defendants was served with process in this action.

Only the first, second and fourth claims for relief were alleged against the named respondents. However, this petition for a writ of certiorari is limited solely to the first claim for relief as pleaded in the complaint. None of the other claims for relief as alleged in the complaint are presented to this Court for any relief.

The Issue Presented

The issue presented by this petition is whether the allegations of the federal claims, as set forth in the first claim for relief, are insubstantial within the

standard and rule stated by this Court in Hagans v. Levine, 415 U.S. 528, 536-539 (1974), so as to preclude subject matter jurisdiction in the federal court.

Point I

The judgment on appeal failed to comply with the rule of law established by this Court.

The District Court, by its memorandum decision dated March 17, 1975 ruled as to the first claim for relief that:

> "Plaintiff's claimed deprivations are, in this Court's view, sufficiently without merit to preclude the invocation of subject matter jurisdiction. There is, for example, no constitutionally guaranteed right to a pre-judgment attachment. In fact, a three-judge court in Bert Randolf Sugar and Wrestling Revue, Inc. v. Curtis Circulation Co., 74 Civ. 78 (S.D. N.Y. Oct. 17, 1974), appeal docketed, 43 U.S.L.W. 3405 (U.S. Jan. 13, 1975) (Nos. 74-858 and 74-859), raises a number of serious questions concerning the constitutionality of the New York statute which authorized the prejudgment order of attachment originally granted to the plaintiff. ..... In essence,

therefore, plaintiff seeks to have this court review the propriety of state court orders. ..... This it cannot do. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). See also, Hill v. McClellan, 490 F. 2d 859, 860 (5th Cir. 1974); Atchley v. Greenhill, 373 F. Supp. 512, 514 (S.D. Texas 1974); Jemzura v. Belden, 281 F. Supp. 200, 205 (N.D.N.Y. 1968). .... Plaintiff has therefor not advanced a claim cognizable under either the Civil Rights Act or the Constitution. Accordingly, the defendants' motion to dismiss for lack of subject matter jurisdiction is granted." (Underscoring added.) (A-5-6).

It is apparent from the District Court's memorandum decision dated March 17, 1975 that the District Court did not limit itself to a review of the allegations of the first claim for relief in order to determine whether the federal claims alleged are substantial or insubstantial for purposes of invoking federal court subject matter jurisdiction, but rather proceeded beyond that issue and considered the merits of the federal claim presented by the allegations thereof and rendered his decision on his view of the substantiality of the merits of the claimed deprivations, as that District Court's memorandum decision shows, to wit:

"Plaintiff's claimed deprivations are, in this Court's view, sufficiently without merit to preclude the invocation of subject matter jurisdiction. There is, for example, no constitutionally guaranteed right to a pre-judgment attachment...." (Underscoring added.)

This Court has clearly held that on a motion to dismiss a complaint on the ground of lack of subject matter jurisdiction of the federal claims by reason of insubstantiality that the settled standard in reviewing the issue of substantiality of the federal claims presented is that the claims must be judged by their

"allegations .... and not by the way the facts turn out or by a decision on the merits. Pacific Electric R. Co. v. Los Angeles, 194 U.S. 112, 118, 48 L. Ed. 896, 899, 24 S. Ct. 586; Columbus R. Power & Light Co. v. Columbus, 249 U.S. 399, 406, 63 L. ed. 669, 675, 6 A.L.R. 1648, P.U.R. 1919 D, 239, 39 S. Ct. 349; South Covington & C. Street R. Co. v. Newport, 259 U.S. 97, 99, 66 L. ed. 842, 844, 42 S. Ct. 418." Mosher v. Phoenix, 287 U.S. 29, 30 (1932); Hagans v. Levine, 415 U.S. 528, 536 (1973).

The District Court order dismissing the complaint was rendered in violation of the clearly stated rule and standard of law set forth by this Court in repeated decisions and must be reversed. Hagans v. Levine, 415 U.S. 528, 536-539 (1974); Mosher v. Phoenix, 287 U.S. 29, 30 (1932); The Fair v. Kohler Die Co., 228 U.S. 22, 26 (1912); Scheuer v. Rhodes, 416 U.S. 232, 238 (1973); Pacific Electric Ry. Co. v. Los Angeles, 194 U.S. 112, 118 (1904); South Covington Ry. Co. v. Newport, 259 U.S. 97 (1921).

Point II

The federal claims alleged in the first claim for relief are substantial.

The allegations of the first claim for relief show that the federal claims are substantial.

The first claim for relief alleged that federal jurisdiction was based upon 42 U.S.C. Section 1983, 28 U.S.C. Section 1343(3), 28 U.S.C. Section 2201, and 28 U.S.C. Section 2283. (A-4) The first claim for relief alleged that the petitioner was seeking to redress the deprivation by the respondents acting under color of state law of the rights, privileges and immunities secured to the plaintiff under the Constitution and laws of the United States, and was seeking a declaratory judgment pursuant to 28 U.S.C. Section 2201 to declare the order of the respondents dated February 13, 1973 in a state court attachment proceeding to be null and void, and petitioner sought to enjoin the enforcement of the Appellate Division order pursuant to 28 U.S.C. Section 2283.

The first claim for relief alleged that: the petitioner was not seeking any compensatory or punitive damages against the defendants, that there was no pending state or local criminal prosecution and none which the plaintiff seeks to enjoin, that the petitioner was seeking to have the federal court pass upon

the constitutionality of New York Civil Practice Law and Rules, Section 6201, Rule 6212(a) and Section 6223 as applied by the respondents in that the said respondents, acting arbitrarily and beyond their jurisdiction and contrary to the settled law of the State of New York applied the statutes invidiously and discriminatorily unequally against the petitioner and differently as to the petitioner than as to everyone else under the same circumstances and conditions and arbitrarily vacated the order of attachment lawfully granted to petitioner upon a ground that was totally irrelevant under the settled law of the State of New York, arbitrarily, outside of the authority of the respondents under the settled law of the State of New York, without any basis in law and in fact, and contrary to the settled law of the State of New York, arbitrarily deprived the petitioner of his property, the order of attachment, which was a statutorily created property interest, and arbitrarily imposed upon the petitioner thereby a liability of $100,000.00 under the statutory attachment bond, taking petitioner's property without due process of law and in violation of the equal protection of the laws.

This Court in Scheuer v. Rhodes, 416 U.S. 232, 236 (1973) held:

> "....it is well established that, in passing upon a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader."

It is also well established that upon

a motion to dismiss the complaint for lack of subject matter jurisdiction that the allegations of the complaint are assumed "to be true in point of fact." The Fair v. Kohler Die Co., 228 U.S. 23, 26 (1912).

The District Court, by its decision dated March 17, 1975, found that the petitioner had alleged in his claims for relief violations of federal constitutional rights within the jurisdiction of the federal court and that but for its conclusion that the claims were insubstantial in merit would have denied the motion to dismiss the claims for relief (A-4,5).

The Supreme Court in Hagans v. Levine, 415 U.S. 528, 536 (1973) stated:

> "Over the years this Court has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit'. Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579 (1904); 'wholly insubstantial', Bailey v. Patterson, 369 U.S. 31, 33 (1962); 'obviously frivolous', Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288 (1910); 'plainly unsubstantial', Levering v. Garrigues Co. v. Morrin, 289 U.S. 103, 105 (1933); or no longer open to discussion', McGilvra v. Ross, 215 U.S. 70, 80 (1909) .... Only recently this Court again reviewed this general question where it arose in the context of convening a three-judge court under 28 U.S.C. Section 2281: "'Constitutional unsubstantiality' for this purpose has been equated with such

> concepts as 'essentially fictitious', Bailey v. Patterson, 369 U.S. at 33; 'wholly unsubstantial' ibid; 'obviously frivolous', Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288 (1910); and 'obviously without merit', Ex parte Poresky, 290 U.S. 30, 32 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words impart that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. Section 2281. A claim is insubstantial only if "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for an inference that the questions sought to be raised can be the subject of controversy."' Ex parte Poresky, supra, at 32, quoting from Hannis Distilling Co. v. Baltimore, supra, at 288; see also Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105-106 (1933); McGilvra v. Ross, 215 U.S. 70, 80 (1909)." Goodby v. Osser, 409 U.S. 512, 518 (1973).' The substantiality doctrine as a statement of jurisdictional principles affecting the power of a federal court to adjudicate constitutional claims has been questioned, Bell v. Hood, 327 U.S. 678, 683 (1943), and characterized as 'more ancient than analytically sound', Rosado v. Wyman, supra 397 U.S. at 404. But it remains the federal rule and needs no re-

examination here, for we are convinced that within accepted doctrine petitioners' complaint alleged a constitutional claim sufficient to confer jurisdiction on the District Court to pass on the controversy.

Jurisdiction is essentially the authority conferred by Congress to decide a given type of case one way or the other. The Fair v. Kohler Die Co., 228 U.S. 22, 25, 33 S. Ct. 410, 411-412, 57 L. ed. 716 (1913). Here, Sections 1343(3) and 1983 unquestionably authorized federal courts to entertain suits to redress the deprivation, under color of state law, of constitutional rights. It is also plain that the complaint formally alleged such a deprivation. The District Court's jurisdiction, a matter of threshold determination, turned on whether the question was too insubstantial for consideration." (Underscoring added.)

The District Court below, while citing Hagans v. Levine, 415 U.S. 528 (1973), failed to follow it.

The District Court dismissed the first claim for relief on two grounds. The first ground was that the petitioner had no constitutional right to a prejudgment attachment and therefore that the deprivation of the prejudgment attachment by the respondents, however accomplished, could not be deemed a deprivation of any federal right, to wit:

> "Plaintiff's claimed deprivations are, in this Court's view, sufficiently without merit to preclude the invocation of subject matter jurisdiction. There is, for example, no constitutionally guaranteed right to a prejudgment attachment. In fact, a three-judge court in Bert Randolph Sugar and Wrestling Revue Inc. v. Curtis Circulation Co., 74 Civ. 78 (S.D.N.Y. Oct. 17, 1974), appeal docketed, 43 U.S.L.W. 3405 (U.S. Jan. 13. 1975) (Nos. 74-858 and 74-859), raises a number of serious questions concerning the constitutionality of the New York statute which authorized the prejudgment order of attachment originally granted to the plaintiff" (A-5,6).

The second ground was that the first claim for relief was foreclosed by a prior ruling of this Court namely, by Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), to wit:

> "In essence, therefore, plaintiff seeks to have this Court review the propriety of state court orders and a judgment. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) .... Plaintiff has, therefore, not advanced a claim cognizable under either the Civil Rights Act or the Constitution. Accordingly, the defendants' motion to dismiss for lack of subject matter jurisdiction is granted..." (A-6).

It is fair to state that there is some ambiguity in the decision as to whether the first claim for relief was dismissed only upon the first ground stated above, or upon both the first and the second ground. That ambiguity is based on the fact that the District Court set forth the second ground follow-

ing his reference to the third claim for relief which related to the alleged judgment rendered by the late State Supreme Court Justice Massi, who dismissed the petitioner's complaint for unspecified "vague and ambiguous allegations", which, as alleged in the third claim for relief, was not any basis or authority to dismiss a complaint under the settled law of the State of New York, on a motion by a defendant which was expressly limited solely to a request for an extension of time to answer the State complaint. See, Shuford v. Anderson, 352 F. 2d 755, cert. den. 383 U.S. 935 (1965); Harman v. Valley National Bank of Arizona, 339 F. 2d 564 (5th Cir. 1964).

It is respectfully suggested that the District Court erred in holding that the prejudgment attachment granted to the petitioner in the state attachment action was not a subject of constitutional protection because 'the statute upon which it was granted was challenged as to its constitutionality'. (A-5,6).

The 'challenge to the New York attachment statutes raised by the decision of the three-judge court in Carey v. Bert Randolph Sugar' supra (383 F. Supp. 643) which was relied upon by the District Court in its decision below (A-5), was rejected by this Court as being premature until the New York courts decide what inquiry into the merits will be made under CPLR Section 6223, at which point it will be time for the federal court to decide whether that standard for the construction of CPLR Section 6223 is "consistent with the constitutional standard." Carey v. Bert Randolph Sugar, etc., ________ U.S. ________, 96 S. Ct. 1208, 1210 (1976). This Court in Carey v.

Bert Randolph Sugar, supra, stated

> "that the New York Court of Appeals has already held that an attachment may be vacated if it 'clearly' appears 'that the plaintiffs must ultimately fail' on the merits. Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 377, 138 N.E. 24, 26. See also Maitrejean v. Levon Properties, 45 A.D. 2d 1020, 358 N.Y.S. 2d 203 (2d Dept. 1973); Richman v. Richman, 41 A.D. 2d 993, 344 N.Y.S. 2d 52 (3rd Dept. 1973); Martin Enterprises, Inc. v. M.S. Kaplan Co., 45 A.D. 883, 358 N.Y.S. 2d 160. The precise nature of any inquiry into the merits which will be made by the New York courts under this rubric is unclear, but an inquiry consistent with the constitutional standard is by no means automatically precluded. Indeed, two New York trial courts have expressly held, subsequent to the decision below, that where fact issues are raised on a motion to vacate an attachment, with respect to the merits of the underlying claim, a preliminary hearing will be held on those issues. Regnell v. Page, 82 Misc. 2d 506, 369 N.Y.S. 2d 936 (Sup. Ct. N.Y. Co. 1975); New York Auction Co. v. Belt, 368 N.Y.S. 2d 98, N.Y.L.J. April 9, 1975, p. 17, C. 3 (Sup. Ct. N.Y. Co.)." Carey v. Bert Randolph Sugar, ________ U.S. ________, 96 S. Ct. 1208, 1210 (1976).

Thus, that construction of CPLR Section 6223 which requires the holding of a pre-

liminary hearing on contested issues of fact as to the merits of the attachment plaintiff's claim appears to be the state construction and appears to be consistent with this Court's constitutional standard.

The issue presented by this petition is the converse of that set forth by this Court in Carey v. Bert Randolph Sugar, supra, namely, that the appellate court respondents vacated petitioner's prejudgment attachment order arbitrarily, without a hearing on the merits and as further set forth herein and as alleged in the first claim for relief, depriving the petitioner of his constitutional rights of due process and equal protection of the laws.

It is important to note that the challenge raised by the plaintiffs to the "New York Attachment Statutes' and ruled on by the three-judge court in Carey v. Bert Randolph Sugar, 383 F. Supp. 643, was confined to a prejudgment attachment obtained under and based upon the grounds described in CPLR Section 6201(4)(5) and (8), namely, issues of fraud and misappropriation "which involve a determination of subjective elements of motive and intent, ... notably unsuitable to determination on documentary proof alone (Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 1962)." The three-judge court in Carey v. Bert Randolph Sugar, supra, distinguished between those claims which were subject to proof by documentation and those which were not as to the grounds for a prejudgment attachment:

> "Second, in Mitchell, the sole issues before the Louisiana court which granted the sequestration order were 'the existence of the debt, the lien and the delinquency.' As the Supreme Court commented, 'These are ordinarily uncomplicated matters that lend themselves to documentary proof (42 U.S. L.W. at 4674), '...documentary proof is particularly suited for questions of the existence of a vendor's lien and the issue of default' (42 U.S.L.W. at 4674 and 4677)."

The three-judge court in Carey v. Bert Randolph Sugar, 383 F. Supp. 634, construed CPLR Section 6223 as follows:

> "The sole basis for vacating the attachment under the CPLR is not (emphasis by court) that the grounds upon which it has been issued are unproven, but rather that the attachment is unnecessary to the security of the plaintiff; and the burden of proof is not, as in Mitchell, on the plaintiff, but on the defendant."

The three-judge court equated proof of the grounds of attachment under CPLR Section 6201 with the requirements of CPLR Rule 6212(a) which provide that

> "On a motion for an order of attachment the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action and one or more grounds for attachment provided in section 6201 that exist and the amount demanded from the defendant above all counterclaims known to the

plaintiff;"

apparently because in that case the grounds and the causes of action were the same.

In this case, the grounds for attachment included the ground that the state attachment defendant, Downe Communications, Inc., was a foreign corporation, which was the ground set forth in CPLR Section 6201(1). The defendant conceded that fact.

In this case, the facts presented to the attachment court also showed, in addition to allegations of fact showing causes of action for fraud, misrepresentation and misappropriation of corporate property, the making of a \$2,000,000.00 written advertisement contract between Mastercraft Electronics Corp. and Downe Communications, Inc., a copy of which was attached to the attachment application, documented full payment by Mastercraft for the advertising, a breach of that written contract by Downe Communications, Inc., supported by documentary evidence of the letter by Downe Communications, Inc. to Mastercraft Electronics Corp., refusing to furnish Mastercraft Electronics Corp. any further advertising space and services, and repudiating the written contract, and a factual specification of the damages; in addition, one other cause of action for breach of a written contract between petitioner Dayon and Downe Communications, Inc., was also documented. In this case the attachment corporate defendant conceded the breach of contract actions, but denied that it had committed fraud, misrepresentation and misappropriation of corporate property. These facts were alleged in the first claim for relief.

When the New York Supreme Court at Special Term Part II granted the plaintiff the order of attachment dated August 14, 1972, that court not only found that the plaintiff had fully complied with the requirements of the attachment statutes, but it imposed the condition thereto that the plaintiff post a surety bond which amounted to \$100,000.00 surety bond, which provided, in accordance with the Statute, CPLR Rule 6212(b), that the plaintiff would pay damages to the attachment defendant "if it is finally decided that the plaintiff was not entitled to an attachment of defendant's property".

The filing of this bond and the incurring of that liability, vested the plaintiff with the right to that order of attachment to the extent that it could not be vacated or taken away from the plaintiff except in accordance to the statute and in accordance to the settled law of the State of New York, and not arbitrarily and in excess of the jurisdiction of the respondents Appellate Division, namely in accordance to due process and equal protection of the law provisions of the federal constitution.

Underlying this Court's decision in Carey v. Bert Randolph Sugar, supra, Mitchell v. W.T. Grant Co., 416 U.S. 600, 613, 614 (1973); Fuentes v. Shevin, 407 U.S. 67 (1973); North Georgia Finishing v. Di-Chem, 419 U.S. 601(1975) is that prejudgment attachment is a valid, constitutionally protected statutory remedy. Mr. Justice Powell, in a concurring opinion in North Georgia Finishing v. Di-Chem, 416 U.S. 601, 610, 611 (1975) noted that there were garnishment and

attachment laws in each of the 50 states and that "The State's legitimate interest in facilitating creditor recovery through the provision of garnishment remedies has never been seriously questioned."

The New York attachment statute was first enacted in 1751, to wit, the New York Absconding Debtor Act of 1751 (An Act to Prevent Frauds in Debtors) c. 908, 3 N.Y. Col. Laws (1894 ed) 835. The Judicial Council (New York), 7th Annual Report and Studies (1941), entitled "Recommendations relating to Attachment", p. 396. The New York attachment statute predated the Constitution.

The New York attachment statute is a remedial and provisional remedy and right and when a plaintiff "fairly brings himself by his application within (its) spirit and intent ...., he is to be protected in the enjoyment of its advantages." Rowles v. Hoare, 61 Barb. 266, 270 (1870), cited in The Judicial Council (New York) 7th Annual Report and Studies, p. 393, note 9. As shown by the said Report, at pp. 393-395, the attachment remedy has an ancient and legitimate lineage:

> "The genesis of attachment has been traced to Roman sources. In Roman law, attachment involved the seizure of the property of a defendant who had 'lurked at home to elude prosecution, or had absconded, so that service of a citation could have no effect.'
>
> The generally accepted view among judges and commentators is that attachment, is a proceeding whereby the defendant's

> property is provisionally seized to satisfy a judgment which the plaintiff expects to recover, has no common law origin. Nevertheless, a type of attachment, analogous to that of the Roman law, was extant in the common law. A defendant who had defaulted on an original process, was subject to a writ of attachment, issued out of the common law courts, commanding the sheriff to attach his goods. If after the seizure of his goods by the sheriff, the defendant appeared, he was entitled to their return 'in the same plight in which they were attached;' if he defaulted, his goods were forfeited. The purpose of the common law attachment was to guarantee the appearance of the defendant. The modern attribute of attachment whereby the claim of the plaintiff is secured to the extent of the property attached, was still wanting.
>
> The modern attachment in English law is based on an early Custom of London, recognized by the merchants of London as early as 1482. 'By the custom of London, one may attach money or goods of the defendant either in the plaintiff's own hands, or in the custody of a third person.' So wrote Bohn in his Privilegia Londini in 1723. Under this Custom, the plaintiff, upon the return nihil to the original process issued in his behalf, if he surmised that another person in the City of London was indebted to the defendant, was entitled to a garnishment against such person. If the person admitted the indebtedness, the debt was attached to secure the plaintiff's demand. The implementing of the Custom of London, and of like customs of other English cities

by the English courts, constitutes the essential basis for the modern attachment. This is particularly true in respect to the attachment of an indebtedness owing to a non-resident defendant."

This Court held in Ettor v. Tacoma, 228 U.S. 148 (1912) that a right of action is a property right. Also, Westerveldt v. Gregg, 12 N.Y. 202,211, 212 (1854). This Court held in Mitchell v. W.T. Grant Co., 416 U.S. 600, 613, 614 (1973) that the remedy of attachment is intertwined with the right of action itself since it provides the means by which the ultimate judgment may be collected. In Mitchell, supra, this Court stated, in regard to the Maine attachment statutory scheme:

> "The attachment was deemed 'part of the remedy provided for the collection of the debt' .... and represented a practice that 'had become fully established in Massachusetts, part of which Maine was at the time of the adoption of the Federal Constitution.' Id., at 114, 141A, at 702. ..."

This Court recognized and confirmed the constitutional validity and legitimacy of the attachment remedy and that it was a right as important to a creditor as the debt for which the remedy was created to aid in and enforce the collection thereof and to make the legal right represented by the cause of action for the debt, a reality. Mitchell v. W.T. Grant Co., 416 U.S. 600, 613, 614 (1973); Cole v. Cunningham, 133 U.S. 107 (1889).

In Lynch v. Household Finance Corp., 405 U.S. 538, 542-552 (1972) this Court resoundingly held:

> "This Court has never adopted the distinction between personal liberties and proprietary rights as a guide to the contours of Section 1343(3) jurisdiction. Today we expressly reject that distinction.
>
> Neither the words of Section 1343(3) nor the legislative history of that provision distinguishes between personal and property rights. In fact, the Congress that enacted the predecessor of Sections 1983 and 1343(3) seems clearly to have intended to provide a federal judicial forum for the redress of wrongful deprivations of property by persons acting under color of state laws.
>
> This Court has traced the origin of Section 1983 and its jurisdictional counterpart to the Civil Rights Act of 1866, 14 Stat. 27, Adickes v. Kress & Co., 398 U.S. 144, 162-163; Monroe v. Pope, 365 U.S. 167, 171, 183-185. That Act guaranteed 'broad and sweeping .... protection' to basic civil rights. Sullivan v. Little Hunting Park, 396 U.S. 299, 237. Acquisition, enjoyment and alienation of property were among those rights. Jones v. Mayer Co., 392 U.S. 409, 432.
>
> The Fourteenth Amendment vindicated for all persons the rights established by the Act of 1866. Monroe, supra, at

171; Hague, supra, at 509-510. 'It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee', Shelley v. Kramer, 334 U.S. 1, 10. ....

... Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal right', whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. .... Congress recognized these rights in 1871 when it enacted the predecessor to Sections 1983 and 1343(3). We do no more than reaffirm the judgment of Congress today."

In <u>Fuentes v. Shevin</u>, 407 U.S. 67, 90 (1972), this Court held:

"The Fourteenth Amendment speaks of 'property' generally."

In <u>Thompson v. Washington</u>, 497 F. 2d 626, 635 (D.C. Cir. 1973), that court held:

"The scope of due process protection also takes into account the source of the interest for which the citizen asserts the protection. It has long been clear that the protected interests include those interests in personal liberty and property nurtured at common law. See Windsor v. McVeigh, 93 U.S. 274, 23 L. Ed. 914 (1876). Protection of property interests has never been in doubt, but the extent of the protection has recently been extended. See Smadach v. Family Finance Corp., 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969) (wage garnishment); Fuentes v. Shevin, supra, (summary repossession). And Wisconsin v. Costantineau, 400 U.S. 433, 437, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971) establishing that a person's interest in his own reputation merits procedural due process protection.

Sound analysis and authoritative precedent conjoins to make it clear that the zone of interests protected by due process procedural requirements includes interests created by statute in favor of a generally-defined class. ....

As for precedent, it suffices to call the roll of the prominent decisions of the past decade: Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) (unemployment compensation); Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L. Ed. 2d 1460 (1958)(tax exemp-

tion); Goldberg v. Kelly, supra, (welfare benefits); Bell v. Burson, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1972) (drivers' licenses); Department of Agriculture v. Murray, 413 U.S. 508, 93 S. Ct. 2832, 37 L. Ed. 2d 767 (June 25,1973) (Food Stamps)."

As it was held in another context, namely on the question of impairment of the obligation of contracts:

"The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of its enforcement. This is the breath of its vital existence. Without it, the contract as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations', as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. 'Want of right and want of remedy are the same thing'. 1 Bac. Abr. Tr. Actions in General. Letter B." Edwards v. Kearzey, 96 U.S. 595, 601 (1871).

The remedy of attachment is as vital to the creditor as the right of action for the debt and both are property rights within the meaning and protection of the Constitution, 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343 (3). Lynch v. Household Finance Corp., 405 U.S. 538, 542-546, 552 (1971); Mitchell v. W.T. Grant Co., 416 U.S. 600, 613, 614 (1973).

The allegations of deprivation of federal constitutional rights set forth in petitioner's first claim for relief are substantial.

Point III

The rule of Rooker v. Fidelity Trust Co. is inapplicable.

The District Court cited Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) as the authority for its holding that the petitioner's federal claim was insubstantial, to wit:

"In essence, therefore, plaintiff seeks to have this Court review the propriety of state court orders.... This it cannot do. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923)."

By citing Rooker, supra, the District Court was holding that the federal claim presented by the petitioner, were insubstantial because that decision of this Court 'inescapably rendered the claims frivolous', Hagans v. Levine, 415 U.S. 528, 537, 538 (1974).

This Court in Goosby v. Osser, 409 U.S. 512, 518 (1973) held that

"In the context of the effect of prior decisions upon the substantiality of constitutional claims those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. Section 2281 (28 U.S.C.S. Section 2281). A claim is insubstantial only if '"its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.".'

Ex parte Poresky, supra, at 32, 78 L. Ed. 152, quoting from Hannis Distilling Co. v. Baltimore, supra, at 288, 54 L. Ed. 482; see also, Levering & Garriques Co. v. Morrin, 289 U.S. 103, 105-106, 77 L. Ed. 1062, 53 S. Ct. 549 (1933); McGilvra v. Ross, 215 U.S. 70, 80, 54 L. Ed. 95, 30 S. Ct. 27 (1909)."

It is respectfully submitted that Rooker v. Fidelity Trust Co., 216 U.S. 413 (1923) does not apply to this federal action and it is plainly not a prior decision on any issue presented by the first claim for relief in this federal action.

The facts in this case are greatly different than those in Rooker v. Fidelity Trust Co., 216 U.S. 413 (1923). In Rooker, the plaintiffs were seeking in federal court to have reversed or modified the actual final

judgment which had been rendered in a state action between the same parties, as to which it was pleaded in the federal bill in equity that the state court had had jurisdiction of the parties, and of the subject matter, and that the only Constitutional issue was whether the state court could, on the appeal to that court from the final judgment, render a decision which was different from that which it had rendered on the appeal from the interlocutory judgment. After the interlocutory judgment, the action was tried on the merits. Plainly, additional facts were presented to and considered by the court following the interlocutory judgment in rendering the final judgment. The federal action involved the very same allegations which were presented to, fully considered and rejected by the state court. See, Brown v. Chastain, 416 F. 2d 1012, 1013 (5th Cir. 1969). The doctrine of res judicata applied to the federal action by reason of that State final judgment on the same issues.

The federal questions presented in this case were not in existence, much less were they presented to the state court. The federal constitutional issues were created by the arbitrary, illegal, null and void order, dated February 13, 1973 of the respondents which vacated the Dayon order of attachment in the Dayon state attachment action against Downe Communications, Inc. and others arbitrarily and in violation of petitioner's constitutional rights to due process of law and equal protection of the laws, as heretofore stated.

Carey v. Bert Randolph Sugar, etc.

________ U.S. ________, 96 S. Ct. 1208 (1976) is not a prior decision foreclosing the first claim for relief. The facts and the law applicable are different, as noted above.

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

Bernard G. Ehrlich, Esq.
Attorney for Petitioner
299 Broadway
New York, N.Y. 10007

Of Counsel:

Charles Sutton, Esq.

Dated: November 9, 1976

APPENDIX

A. ORDER OF DISTRICT COURT
DATED APRIL 22, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------------------------------X

AL DAYON, individually and on behalf of MASTERCRAFT ELECTRONICS CORP.,

Plaintiff,

-against-

THE HONORABLE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, THE HONORABLE HAROLD A. STEVENS, THE HONORABLE THEODORE R. KUPFERMAN, THE HONORABLE GEORGE TILZER, THE HONORABLE AARON STEUER and THE HONORABLE EMILIO NUNEZ, JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, THE HON. VINCENT A. MASSI, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, DOWNE COMMUNICATIONS, INC., EDWARD R. DOWNE, JR., WILLIAM H. KEHL as Sheriff of the City of New York and THE AETNA CASUALTY AND SURETY COMPANY,

Defendants.

----------------------------------X

ORDER

74Civ.5616
RJW

In the above entitled action, a motion having been made for defendants, Justices of the Supreme Court of the State of New York, Appellate Division, First Department, for an order pursuant to Rule 12(b)(1) of the Fed. R. Civ. P. dismissing the complaint for lack of jurisdiction over the subject matter and the Court having issued and filed its Memorandum Decision dated March 17, 1975, it is hereby

ORDERED, that the motion for defendants, Justices of the Supreme Court of the State of New York, to dismiss the complaint for lack of jurisdiction over the subject matter is granted.

Dated: New York, New York
April 22, 1975

/s/ ROBERT J. WARD
UNITED STATES DISTRICT JUDGE

B. MEMORANDUM DECISION OF DISTRICT COURT DATED MARCH 17, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AL DAYON, individually and on behalf of MASTERCRAFT ELECTRONICS CORP.,

Plaintiff,

-against-

THE HONORABLE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, THE HONORABLE HAROLD A. STEVENS, THE HONORABLE THEODORE R. KUPFERMAN, THE HONORABLE GEORGE TILZER, THE HONORABLE AARON STEUER and THE HONORABLE EMILIO NUNEZ, Justices of the Supreme Court of the State of New York, Appellate Division, First Department, the HON. VINCENT A. MASSI, Justice of the Supreme Court of the State of New York, New York County, DOWNE COMMUNICATIONS, INC., EDWARD R. DOWNE, JR., WILLIAM H. KEHL, as Sheriff of the City of New York and The Aetna Casualty and Surety Company,

Defendants.

74Civ.5616
R.J.W.

Defendants, the Justices of the Supreme Court of the State of New York, Appellate Division, First Department, move for an order, pursuant to Rule 12(b)(1), Fed. R. Civ. P., dismissing the complaint for lack of jurisdic-

tion over the subject matter. The action was brought pursuant to the Civil Rights Act, 42 U.S.C. Section 1983, and jurisdiction is invoked under 28 U.S.C. Section 1343(3), by Al Dayon, individually and on behalf of Mastercraft Electronics Corp.

Plaintiff alleges that actions taken by these and other defendants, in effect, deprived him of constitutionally secured privileges and immunities and violated his constitutionally protected rights to due process of law and equal protection. In sum, plaintiff alleges that he was deprived of his rights as a result of the Appellate Division's failure to comply fully with New York law governing the vacation of a prejudgment order of attachment. Consequently, he contends that the Appellate Division's order dated February 13, 1973 vacating an attachment previously granted him was improper. In addition, he alleges that his rights were violated by the decision of defendant Massi, which resulted in the entry of an order on February 26, 1973, dismissing his complaint with leave to serve an amended complaint, without any motion to that effect being made by his adversaries. He refused to amend his complaint and a judgment dismissing the case on the merits was entered on March 13, 1973.

In addition, plaintiff contends that he was wrongfully denied judicial review of his grievances, in the first instance, by the refusal of the Appellate Division to grant him leave to appeal its order of February 13 to the New York Court of Appeals, and secondly, by its dismissal of his appeal from the February 26 order of the Supreme Court on the grounds that the judgment of March 13, 1973 "superseded" the order of February 26.

The complaint requests this Court to annul the Appellate Division's order of February 13 vacating the prejudgment order of attachment originally granted by the Supreme Court, Bronx County, at Special Term, as well as any other actions or proceedings arising out of the Appellate Division's order. In addition, plaintiff seeks a declaratory judgment that the complaint and affidavits submitted by the plaintiff to the state court are sufficient to show that plaintiff has a cause of action; and that the complaint constitutes a legally sufficient pleading. For the reasons hereinafter discussed even when one views plaintiff's claims in the most favorable light, it is clear that this Court lacks jurisdiction over the subject matter.

Title 28 U.S.C. Section 1343(3) confers jurisdiction upon district courts when there is a constitutional claim "of sufficient substance to support federal jurisdiction" Hagans v. Lavine, 415 U.S. 528, 536 (1974). Since the rights sought to be protected under 42 U.S.C. Section 1983 are fundamental to our system of justice, district courts should only dismiss claims for lack of jurisdiction when they are "so insubstantial, implausible, foreclosed by prior decisions ... or otherwise completely devoid of merit..." Id. at 543, quoting Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666 (1974).

Plaintiff's claimed deprivations are, in this Court's view, sufficiently without merit to preclude the invocation of subject matter jurisdiction. There is, for example, no constitutionally guaranteed right to a prejudgment attachment. In fact, a three-judge court in Bert Randolph Sugar and Wrestling Revue, Inc.

v. Curtis Circulation Co., 74 Civ. 78 (S.D.N.Y. Oct. 17, 1974), appeal docketed, 43 U.S.L.W. 3405 (U.S. Jan. 13, 1975) (Nos. 74-858 and 74-859), raises a number of serious questions concerning the constitutionality of the New York statute which authorized the prejudgment order of attachment originally granted to the plaintiff.

Moreover, any deprivation of rights which may have obtained from the unfavorable judgment of March 13 was self-imposed since plaintiff voluntarily refused to amend his complaint. There is no constitutionally protected right to litigate such matters.

In essence, therefore, plaintiff seeks to have this Court review the propriety of state court orders and a judgment. This it cannot do. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). See also Hill v. McClellan, 490 F. 2d 859, 860 (5th Cir. 1974); Atchley v. Greenhill, 373 F. Supp. 512, 514 (S.D. Texas 1974); Jemzura v. Belden, 281 F. Supp. 200, 205 (N.D.N.Y. 1968). Plaintiff also asks this Court to declare his complaint to have been legally sufficient. He also requests this Court to annul the vacation of a prejudgment order of attachment. Such actions are proper for an appropriate appellate court but not a federal trial court. See, e.g., Adkins v. Underwood, 370 F. Supp. 510, 514-15 (N.D. Ill. 1974). Plaintiff has, therefore, not advanced a claim cognizable under either the Civil Rights Act or the Constitution, Accordingly, the defendants' motion to dismiss for lack of subject matter jurisdiction is granted. There is a serious question regarding defendants' immunity from suit. Since defendants have not chosen to argue this question and the Court has determined

that it lacks subject matter jurisdiction, it is unnecessary to pass upon this question.

Settle order on notice.

Dated: March 17, 1975

/s/ Robert J. Ward
U.S.D.J.

C. JUDGMENT OF COURT OF APPEALS
DATED JUNE 16, 1976

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of June, one thousand nine hundred and seventy-six.

Present: HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES
HON. MURRAY I. GURFEIN,
Circuit Judges.

Al Dayon, individually and on behalf of Mastercraft Electronics Corp.,

Plaintiff-appellant

v.

The Honorable Supreme Court of The State of New York, Appellate Division, First Department, The Honorable Harold A. Stevens, The

Honorable Theodore R. Kupferman, The Honorable George Tilzer, The Honorable Aaron Steuer and The Honorable Emilio Nunez, Justices of The Supreme Court of The State of New York, Appellate Division, First Department, The Honorable Vincent A. Massi, Justice of The Supreme Coutt of The State of New York, New York County, Downe Communications, Inc., Edward R. Downe, Jr., William H. Kehl as Sheriff of the City of New York and The Aetna Casualty and Surety Company, 75-7307

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

by

Vincent A. Carlin
Chief Deputy Clerk

D. ORDER DENYING REHEARING OF COURT OF APPEALS DATED AUGUST 13, 1976

**UNITED STATES COURT OF APPEALS
SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of August, one thousand nine hundred and seventy-six.

Present: HON. WALTER R. MANSFIELD,
HON. JAMES L. OAKES,
HON. MURRAY I. GURFEIN,
Circuit Judges.

Al Dayon, individually and on behalf of Mastercraft Electronics Corp.,
Plaintiff-Appellant,

v.

The Honorable Supreme Court of the State of New York, Appellate Division, First Department, The Honorable Harold A. Stevens, The Honorable Theodore R. Kupferman, The Honorable George Tilzer, The Honorable Aaron Steuer and The Honorable Emilio Nunez, Justices of the Supreme Court of the State of New York, Appellate Division, First Department, et al., 75-7307

Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

By: /s/ Edward J. Guardaro

EDWARD J. GUARDARO
Senior Deputy Clerk